UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. MATTHEW CATE, Secretary, Respondent.	))))))))))	Civil No. 07cv2183-DMS (BLM) **REPORT AND RECOMMENDATION DENYING PETITIONER'S REQUEST FOR STAY AND ABEYANCE**

This Report and Recommendation is submitted to United States District Judge Dana M. Sabraw pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. Currently before the Court is a motion to stay and abey federal proceedings while Petitioner James H. Cunningham, a state prisoner proceeding *pro se*, exhausts his claims in state court. Doc. No. 19, Ex. H ("Mot. to Stay"). For the reasons discussed below, the Court recommends that Petitioner's request for stay and abeyance be **DENIED**.

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FACTUAL AND PROCEDURAL BACKGROUND

This is Petitioner's second federal petition for habeas corpus. Petitioner filed the first petition in the Southern District of California in September 2006 and, upon learning that he was required to exhaust his claims in the state system before presenting them in federal court, moved to dismiss the petition in November 2006. Cunningham v. Clay, 06cv2168-JM (CAB) ("Fed. Pet. 1"). After the district judge dismissed the petition, Petitioner presented his claims to the California Supreme Court, and upon that court's denial, filed the instant case on November 23, 2007. ("Pet.")

Petitioner's 2007 petition presented the following claims: (1) the trial court violated Petitioner's due process rights when it prevented him from presenting evidence impeaching a prosecution witness' credibility; (2) the trial court violated Petitioner's right to confront witnesses when it prohibited him from cross-examining an adverse witness; (3) the trial court erred when it denied Petitioner's request to instruct the jury on possession of a firearm for self-defense; and (4) the trial court erred when it gave the statutory flight instruction over the defense's objection. Pet. at 6-9. Although presented in a different manner, these claims are effectively identical to those contained in the 2006 federal petition.

The same day he filed the 2007 petition, Petitioner filed a Motion for Stay and Abeyance of Federal Habeas Corpus Petition to Exhaust Additional Unexhausted Claims in the State Courts. Doc. No. 3. The District Judge denied this motion without prejudice, because Petitioner failed to specify the claims he was seeking to exhaust. Doc. No. 5. On January 9, 2008, Petitioner filed a renewed motion to stay and abey the federal proceedings. Doc. No. 12. Because

Petitioner had again neglected to identify the claims he was seeking to exhaust, the Magistrate Judge[1] denied the motion without prejudice. Doc. No. 15.

On March 7, 2008, Petitioner filed the currently-operative first amended petition. Doc. No. 19 ("FAP"). In the amended petition, Petitioner re-asserts the claims contained in the original petition,[2] and presents the following new grounds for relief. (FAP pt. 2, at 50-68). In Ground One, he argues that the trial court erred when it (a) instructed the jury with CALJIC 17.01, which permitted the jury to convict Petitioner of charges not previously alleged (id. pt. 1, at 8-16), (b) failed to correctly instruct the jury on general intent and the definition of assault (id. pt. 1, at 7, 19-23), (c) failed to *sua sponte* instruct the jury that the general intent instruction also applied to the allegation of personal use of a firearm (id. pt. 1, at 24-27), (d) failed to instruct the jury on lesser-included offenses relating to the firearm-use allegation (id. pt. 1, at 28-35), (e) refused to instruct the jury on California Penal Code section 417, brandishing a firearm, as a lesser-included offense of assault with a firearm (id. pt. 1, at 36-44), and (f) instructed the jury with CALJIC 2.02 rather than CALJIC 2.01, relating to the use of circumstantial evidence (id. pt. 1, at 45-55). Petitioner also alleges that his appellate counsel rendered ineffective assistance by failing to raise any of these instructional errors on appeal. (See id. pt. 1, at 7, 8, 24, 28, 36, 45.)

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[1]This case originally was assigned to Magistrate Judge Ruben B. Brooks, and was transferred to this Court on August 8, 2008. Doc. No. 35.

[2]Cunningham's FAP is lengthy, and was thus divided into two parts before being electronically scanned and placed on the docket. As a result, the document is not consecutively paginated. Accordingly, the Court will cite to the FAP by referring to "part 1" or "part 2," and the page number provided on the docket.

In Ground Two of the FAP, Petitioner contends that the prosecutor wrongfully excluded African-Americans from the jury, and that the trial court erred in denying the defense's motion for a mistrial based on this exclusion. (Id. pt. 1, at 58-61.) Here, too, he argues ineffective assistance of counsel for his attorney's failure to raise the claim on appeal. (Id.)

Ground Three alleges ineffective assistance of trial counsel based on Petitioner's attorney's (a) failure to object to the provision of CALJIC 2.02, concerning the sufficiency of circumstantial evidence to prove intent, (b) failure to request an instruction that the definitions of assault and general intent applied to the lesser-included offense of simple assault, (c) failure to request an instruction that the definition of general intent applied equally to the firearm-use allegation, (d) failure to request an instruction on lesser-included offenses related to the firearm-use allegation, (e) failure to request the court to instruct the jury with a modified version of CALJIC 2.52 regarding flight from police, (f) failure to move to suppress evidence seized from Petitioner's home, and (g) failure to object to the use of CALJIC 17.01. (Id. pt. 2, at 2-48.)

Petitioner admits that Grounds One, Two, and Three of the FAP have not been exhausted in state court. Mot. to Stay at 1. However, on March 3, 2008, Petitioner filed a habeas corpus petition presenting the unexhausted claims to the California Supreme Court. Doc. No. 25 (Opposition to Motion to Stay and Abey "Opp'n") at 3 & n.2. This petition has not yet been adjudicated. Petitioner subsequently filed the motion to stay and abey currently before this Court, requesting that his federal petition be stayed pending resolution of the petition before the California Supreme Court. Mot. to Stay. In support, Petitioner argues that because he only recently became aware of the new claims, and because he suffers from mental health disorders and only has an elementary education, good cause exists for his failure to previously exhaust his claims. Id. at 2.

On April 16, 2008, Respondent filed an opposition to Petitioner's motion to stay, arguing that Petitioner does not show good cause for his failure to exhaust, and that the motion to stay must therefore be denied. Opp'n at 4-5. Petitioner did not file a reply.

DISCUSSION

I. LEGAL STANDARD

A federal court may not consider a petition for habeas corpus unless the petitioner first has presented his claims to the state courts, thereby "exhausting" them. 28 U.S.C.A. § 2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 522 (1982). The exhaustion requirement is founded on federal-state comity, as only when the state court has been presented with the claim may it "pass on and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*) (quotes and citations omitted).

Pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), all federal habeas petitions are subject to a one-year statute of limitations, and claims not exhausted and presented to the federal court within the one-year period are forfeited. 28 U.S.C. § 2244(d). When a petition for habeas corpus contains both exhausted and unexhausted claims, the petitioner may return to state court to exhaust the remaining claims. Rhines v. Weber, 544 U.S. 269, 277 (2005). However, the AEDPA statute is not tolled by the filing of a federal habeas petition (id.), so a federal petitioner seeking to return to state court to exhaust claims must do so and subsequently re-present the newly-exhausted claims within the one-year period (Rhines, 544 U.S. at 277). This is not always possible, and in such situations petitioners "run the risk of forever losing their opportunity for any federal review of their unexhausted claims." Rhines, 544 U.S. at 275.

To permit petitioners to exhaust their claims without running afoul of the statute of limitations, the Supreme Court determined that petitioners may request a stay of their petition pending resolution of the unexhausted claims in state court. Id. at 276-278. However, "a stay and abeyance should be available only in limited circumstances, and is appropriate only when the district court determines that there was good cause for the failure to exhaust." Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (applying Rhines standard). In addition to "good cause," a petitioner must show that his unexhausted claims are "potentially meritorious," and that there is "no indication that the petitioner engaged in intentionally dilatory litigation tactics." Rhines, 544 U.S. at 278. These safeguards are necessary to ensure that the stay and abeyance procedure does not frustrate AEDPA's twin purposes of reducing delays in the execution of state and federal criminal sentences and of encouraging petitioners to fully exhaust their claims before filing in federal court. Jackson, 425 F.3d at 660.

Neither the Supreme Court nor the Ninth Circuit have defined what constitutes "good cause" for failure to exhaust a claim, and, until very recently, the Ninth Circuit merely had opined that good cause requires something less than a showing of "extraordinary circumstances." Jackson, 425 F.3d at 662. However, in August 2008, the Ninth Circuit analyzed the standard in Wooten v. Kirkland, — F.3d —, 2008 WL 3905044 (9th Cir. 2008). In Wooten, petitioner's attorney filed direct appeals in the state court of appeal and the California Supreme Court, both of which were denied. Id. at *1. Although petitioner was "under the impression" that his counsel presented all claims at both levels of appeal, one claim was in fact omitted from the state supreme court petition. Id.

On federal habeas review, the district court held that the omitted claim was not exhausted. Id. at *2. The court denied petitioner's motion to stay and abey the case while he returned to state court, holding that petitioner's failure to realize he had an unexhausted claim did not constitute good cause. Id. The Ninth Circuit upheld the district court's decision, stating that:

> To accept that a petitioner's "impression" that a claim had been included in an appellate brief constitutes "good cause" would render stay-and-abeyance orders routine.
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> ... Additionally, were we to endorse such a broad interpretation of "good cause" that allowed for routine stays of mixed petitions, we would also be undermining the goals of AEDPA. In authorizing stays of habeas petitions only in "limited circumstances," Rhines explicitly acknowledges AEDPA's dual purposes: to reduce delays in executing state and federal criminal sentences and to streamline federal habeas proceedings by increasing a petitioner's incentive to exhaust all claims in state court. Stays, however, delay the execution of sentences and reduce a petitioner's incentive to exhaust all claims in state court. See [Rhines] at 277 ("Stay and abeyance, if employed too frequently, has the potential to undermine [AEDPA's] twin purposes.")

Id. at *3 (footnote and citation omitted).

In declining to adopt a "broad interpretation" (id.) of good cause, the court moved away from the more liberal standards previously enunciated by some district courts, and re-emphasized that motions to stay only would be granted in "limited circumstances." Compare id.

(good cause not found when petitioner mistakenly believed that his attorney exhausted all claims), and Riner v. Crawford, 415 F.Supp.2d 1207, 1210 (D.Nev. 2006) (good cause may be found when a petitioner shows "he was prevented from raising the claim, either by his own ignorance or confusion about the law or the status of the case").[3]

When a petitioner shows good cause for his failure to exhaust, presents potentially meritorious claims, and demonstrates that he has not engaged in dilatory litigation tactics, "it likely would be an abuse of discretion for a district court to deny a stay." Rhines, 544 U.S. at 278. "In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." Id.

II. GOOD CAUSE

Petitioner argues that good cause exists for his failure to exhaust his claims because his appellate counsel failed to raise the claims on direct appeal, because he suffers from "mental health disorders," and because he has an elementary-level education. Mot. to Stay at 2. Petitioner argues that he only was made aware of the unexhausted claims when Elliot Griffin, a fellow inmate who has been assisting him, brought them to his attention. Id. at 2.

Accompanying Petitioner's motion to stay is a declaration by Griffin, who states that he first met with Petitioner in October 2007, and after reviewing Petitioner's trial transcripts, he found several

[3]District courts in the Ninth Circuit typically have applied one of two tests for "good cause." The first test requires a "petitioner to show 'some objective factor external to the petitioner' which prevented timely exhaustion," while the second "equate[s] the good cause standard to 'excusable neglect.'" Smith v. Giurbino, 2008 WL 80983 at *4 (S.D.Cal.) (citing Johnson v. Sullivan, 2006 WL 3707 at *3 (C.D. Cal.) and Corjasso v. Ayers, 2006 WL 618380 (E.D. Cal.)). While the Court questions the continued validity of these tests in light of Wooten and Rhines, for the reasons set forth in this Report and Recommendation, the Court finds that Plaintiff has not established the requisite good cause under either test.

arguable issues that had not been raised on appeal. FAP Ex. G. Griffin declares that he investigated the matter and drafted the FAP on Cunningham's behalf. Id. He further declares that Cunningham has an elementary grade education, with particular difficulty reading and comprehending what he reads, and that Petitioner suffers from mental disorders. Id. The declaration is supplemented with a prison report reflecting that when he was tested on August 17, 2006, Petitioner's reading and language skills were at a sixth-grade level. Id.

Respondent opposes Petitioner's motion to stay, arguing that neither Petitioner's lack of education nor the alleged ineffectiveness of his appellate counsel constitute good cause. Opp'n 4-5. Respondent also contends that Petitioner has failed to show sufficient diligence in pursuing his claims. Id. at 5. Respondent does not address the potential merit of Petitioner's unexhausted claims or whether Petitioner engaged in dilatory litigation tactics. Id.

A. AEDPA's Purposes

Stay and abeyence pending exhaustion of claims in state court is only available in "limited circumstances" where the petitioner shows good cause for his failure to previously exhaust. Rhines, 544 U.S. at 277. The paramount concern in considering a motion to stay is adherence to AEDPA's twin objectives of encouraging petitioners to "seek relief from state courts in the first instance" and "reduc[ing] delays in the execution of state and federal criminal sentences." Id. at 276; Wooten, 2008 WL 3905044 at *3. In light of these objectives, Petitioner's arguments for his failure to exhaust his claims do not constitute good cause.

Granting the instant motion to stay would directly contradict AEDPA's goal of encouraging petitioners to exhaust their claims without returning to state court. In 2006, the district court clearly informed petitioner of the exhaustion requirement stating that "[t]o exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. The petitioner must have raised the very same federal claims brought in the federal petition before the state supreme court." Fed. Pet. 1, Doc. No. 2 at 1. (citations omitted) (emphasis in original).

Thereafter, Petitioner dismissed his federal petition and, armed with knowledge of the exhaustion requirement and all of the facts that underlie both his exhausted and unexhausted claims, returned to state court and exhausted several claims. To stay his petition while he presents claims to the California Supreme Court for a second time would contravene AEDPA's purpose of encouraging petitioners to "seek relief from state courts in the first instance." Rhines, 544 U.S. at 276.

B. Counsel's Failure to Raise the Claims on Direct Appeal

Petitioner argues that his counsel's failure to raise the new claims on direct appeal constitutes good cause for the subsequent failure to exhaust. Mot. to Stay at 2 ("Petitioner could not with due diligence present these unexhausted claims in the State Court based on the fact that the appellate counsel should have raised these several arguable issues on direct appeal"). This argument is unavailing.

As the Ninth Circuit recently reiterated, counsel's failure to raise an issue on direct appeal does not constitute good cause for petitioner's failure to present the claim to the state courts on habeas review. Wooten, 2008 WL 3905044 at *3; see also Hernandez v Sullivan, 397 F.Supp.2d 1205, 1207 (C.D.Cal. 2005) ("[T]he alleged failure of Petitioner's appellate counsel to raise the unexhausted claims ... does not establish 'good cause.' Appellate counsel's alleged failure did nothing to prevent Petitioner from seeking state habeas relief for the unexhausted claims"). This argument therefore does not provide the requisite "good cause." This is especially true in the instant case where Petitioner filed a state habeas petition asserting several claims.

C. Petitioner's Mental Condition and Education

Petitioner argues that he suffers from "mental health disorders" and only has an elementary grade education, and that these conditions constitute good cause for his failure to exhaust. Mot. to Stay at 2. After a careful review of the record, and particularly Petitioner's medical reports, the Court does not find support for these arguments.

On October 16, 2006, the district court informed Petitioner of the exhaustion requirement, and, shortly thereafter, Petitioner moved to dismiss his first federal petition in order to return to state court. Fed. Pet. 1, Doc. Nos. 2 & 4. After presenting claims to the California Supreme Court, on November 13, 2007, Petitioner concurrently filed his second petition in federal court and moved to stay the new proceedings so he could return again to state court to exhaust more claims. Doc. Nos. 1 & 3. The period between October 16, 2006 (when Petitioner first was alerted to the exhaustion requirement) and November 13, 2007 (when he returned to federal court and filed his first motion to stay) is the time during which it is indisputable that Petitioner was both aware of the exhaustion requirement and able to exhaust his claims without court intervention. This is thus the relevant time period for evaluating Petitioner's mental capacity as it relates to the pending motion.

Although doctors state that Petitioner is depressed (see, e.g., Doc. No. 10 at 70, Doc No. 23-4 at 8) and that he suffers from "psychosis"[4] (see, e.g., Doc. No. 10 at 70), the evidence indicates that Petitioner was able to function normally during this time. In numerous reports created during the relevant period, Petitioner is described as "doing fine with no problems to report" (Doc. No. 10 at 32, 36, 39, Doc. No. 10-4 at 41, 49), "basically doing very well" (Doc. No. 10-4 at 47), and "in no acute mental distress" (Doc. No. 10-4 at 43, 48, Doc. No. 10 at 38). See also Doc. No. 10-2 at 10 (July 2007 report that Petitioner "[h]as started class, enjoying it a lot, interested in learning, happy to be productive").

Further, in January 2007, Petitioner's "intellectual functioning, concentration, attention" and "memory" were rated as normal. Doc. No. 10 at 71. Petitioner also scored a sixty-four on the "Global Assessment of Functioning" scale (id. at 72), which "reflects mild symptoms or 'some difficulty' in the areas of social or occupational functioning, but the individual 'generally functions pretty well.'" Doc. No. 34 (order denying Petitioner's motion for appointment of counsel or guardian *ad litem*) (quoting Sims v. Barnhart, 309 F.3d 424, 427 (7th Cir. 2002) (citation omitted)); see also Doc. No. 10-4 at 1 (doctor's statement that Petitioner is "[d]oing well in school").

Additionally, Petitioner's argument that mental health problems prevented him from exhausting his claims are not consistent with his

[4]The nature of Petitioner's "psychosis" is never explained. However, it appears that it concerns a fear of being hurt by fellow inmates, who "jumped" him at least once. See Doc. No. 10 at 29 (petitioner's statement to doctor that " ... I have a lot of paranoia. I was jumped at another prison by a couple of guys and I think it's going to happen again"); see also id. at 71.

litigation history thus far. Upon learning of the exhaustion requirement, Petitioner presented the state court with a habeas petition containing four claims. Clearly, he was able to comprehend the need to exhaust and to select those claims he wished to present.[5] Petitioner's psychological condition therefore does not constitute good cause for his failure to exhaust.

Finally, the Court is not persuaded by Petitioner's argument that his alleged elementary-level education is good cause for his failure to exhaust. Mot. to Stay at 2. First, many state prisoners have not attended school beyond the elementary level, and to accept this as "good cause" "would render stay-and-abey-orders routine." Wooten, 2008 WL 3905044 at *3 (emphasizing that stay orders only be granted in "limited circumstances"). Second, it is not entirely clear that Petitioner's education did not extend beyond elementary school. In January 2007, Petitioner informed a doctor that he has a GED and attended San Diego State College. Doc. No. 10 at 70. Petitioner therefore fails to demonstrate good cause on these grounds as well.

Because Petitioner fails to show good cause for his failure to exhaust the new claims, the Court need not consider the whether his arguments are "plainly meritless" or whether Petitioner engaged in "intentionally dilatory litigation tactics." Wooten, 2008 WL 3905044 at *3. The Court therefore **RECOMMENDS** that Petitioner's motion to stay and abey be **DENIED.**

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[5]Petitioner filed his first state habeas petition in April 2007, and at that time was acting without the assistance of fellow-inmate Griffin. See FAP Ex. G at 2 (Declaration by Griffin stating he met Petitioner in October 2007). Despite the fact that Petitioner is currently receiving assistance, he has thus demonstrated the ability to litigate independently as well.

CONCLUSION

For these reasons, the Court recommends that the district court **DENY** Petitioner's request to hold his Amended Petition in abeyance pending state court exhaustion of Grounds One, Two, and Three.

This Report and Recommendation is submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the district court and serve a copy on all parties on or before **September 26, 2008**. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before **October 10, 2008**. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: September 8, 2008

BARBARA L. MAJOR
United States Magistrate Judge

COPY TO:

HON. DANA M. SABRAW
U.S. DISTRICT JUDGE

ALL COUNSEL AND UNREPRESENTED PARTIES